Supreme Court, U.S.
FILED
MAY 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-1636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF IOWA AND
IOWA DEPARTMENT OF NATURAL RESOURCES,
Cross-Petitioners,

JOHN R. WILSON; CHARLES E. LAKIN, FLORENCE LAKIN; R.G.P., INC., AN IOWA CORPORATION HAROLD JACKSON; AND OTIS PETERSON,

(Cross-Petitioners on Separate Petitions)

v.

THE OMAHA INDIAN TRIBE,
Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM H. VEEDER
818 18th Street, N.W. #920
Washington, D.C. 20006
(202) 466-3890

Attorney for Omaha Indian Tribe of Nebraska, Cross-Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

32 pp

QUESTIONS PRESENTED

Whether the Court shouldn't first consider the grave misconduct of Evan L. Hultman, United States Attorney—who forced his rejected, fraudulent representation upon Cross-Respondent Tribe, in *United States v. Wilson*, Cross-Petitioner Iowa having admitted that Evan L. Hultman, as Attorney General of the State of Iowa, had previously represented the State of Iowa in a quiet-title suit with Cross-Petitioners Lakin and R.G.P., Inc. (Peterson) involving the "same area" of the Blackbird Bend Meander Lobe—antecedent to considering the Constitutionality of 25 U.S.C. 194, as requested by Cross-Petitioner Iowa?

Whether the Court shouldn't first consider the grave misinterpretation by the Court of Appeals of the Court's decision in *Wilson v. Omaha*—in which the Court of Appeals denied Cross-Respondent Tribe's title to the "same area" of land now occupied by Cross-Petitioner State of Iowa, Tribe having proved its title to that "area" of land without the aid of 25 U.S.C. 194—antecedent to considering the Constitutionality of 25 U.S.C. 194, as requested by Cross-Petitioner Iowa?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	3
CONSTITUTIONAL PROVISIONS	4
STATUTORY PROVISIONS AND RULES INVOLVED	4
STATEMENT OF THE CASE	5
CROSS-PETITIONER IOWA IS SEEKING AN ADVISORY OPINION	6
CROSS-PETITIONER IOWA ADMITS BASIC CHARGES BY CROSS-RESPONDENT TRIBE AGAINST UNITED STATES ATTORNEY HULTMAN	13
Cross-Respondent Tribe Proved Its Title Without the Aid of 25 U.S.C. 194	13
COURT OF APPEALS EFFECTIVELY ABROGATED THE COURT'S *Wilson v. Omaha* DECISION	18
TRIAL ON THE MERITS PERTAINED TO 6390 ACRES—NOT CONSTRICTED BARRETT SURVEY LINE	21
Principles of *Res Judicata* Forclose Cross-Petitioner Iowa's Efforts To Force a New Trial of Issues Already Concluded	26
CONCLUSION	27

TABLE OF AUTHORITIES

	Page
Brandon v. Holt, 469 U.S. 464, 471 (1985)	24
Chicago and S. Airlines v. Waterman Steamboat Co., 333 U.S. 103, 113-114 (1988). 1.C. Warren, *The Supreme Court in United States History* (Boston: Rev. Ed. 1926), 108-111	7
Dean Foods Co. v. Albrecht Dairy Co., 396 F.2d 652 (CA 8, 1968).	23
Fiske v. Buder, 125 F.2d 841, 849 (CA 8, 1942); *cert.den.* 273 U.S. 756 (1922)	10
Omaha v. Wilson, 575 F.2d 620, 622, (CA 8, 1988)	*passim*
RE: *U.S. v. Wilson; Omaha Indian Tribe v. Jackson; Omaha Indian Tribe v. Agricultural . . . Wilson*, 524 F.Supp. 874 (U.S.D.C.N.D. Iowa W.D. 1981)	*passim*
Shelley v. Union Oil Co., 203 F.2d 808 (CA 9, 1956)	23
United States v. Wilson, 433 F.Supp. 57 (U.S.D.C.N.D. Iowa W.D. 1977)	*passim*
United States v. Wilson, 433 F.Supp. 67, 88 para. V. (U.S.D.C.W.D. 1977)	*passim*
United States v. Wilson, 707 F.2d 304, 309 (CA 8, 1982)	*passim*
United States v. Wilson, 578 F.Supp. 1191, 1193 (U.S.D.C.N.D. Iowa W.D. 1984)	*passim*
Vogrin v. Hedstrom, 220 F.2d, 863 (CA 8, 1955) *cert.den.* 350 U.S. 845 (1955)	23
Wilson v. Omaha, 442 U.S. 653 (1979)	*passim*
Statutes	
25 U.S.C. 194	*passim*

Table of Authorities Continued

Page

Miscellaneous

Vol. 3, *Moore's Federal Practice* (Cumulative Supplement, 1988-89) "To Conform To Evidence R 15(b)," Sec. 15-13[1]. p. 15-119 23

Vol. 6, *Federal Practice and Procedure*, Sec. 1491, p. 45 24

Rule 15(b), Federal Rules of Civil Procedure 23

Restatement (Second) Judgment, para. 27, p. 250 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1636

STATE OF IOWA AND
IOWA DEPARTMENT OF NATURAL RESOURCES,
Cross-Petitioners,
JOHN R. WILSON; CHARLES E. LAKIN, FLORENCE LAKIN; R.G.P., INC., AN IOWA CORPORATION; HAROLD JACKSON; AND OTIS PETERSON,
(Cross-Petitioners on Separate Petitions)
v.

THE OMAHA INDIAN TRIBE,
Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Cross-Respondent Omaha Indian Tribe respectfully opposes the Cross-Petition filed by State of Iowa and Iowa Department of Natural Resources seeking to review the judgment of the United States Court of Appeals for the Eight Circuit.

OPINIONS BELOW[1]

The United States District Court for the Northern District of Iowa entered its Memorandum of Opinion

---

[1] Appendix A, *United States V. Wilson; Omaha v. Jackson, et*

on January 13, 1984, holding that Petitioner Omaha Indian Tribe could not prevail against the State of Iowa as to any lands claimed by Respondent Iowa or concerning fee-patented lands claimed by private Respondents. That Memorandum Opinion is Appendix A of this Petition. Subsequently the District Court, on May 29, 1987, entered its Final Judgment and Decree, which was amended June 30, 1987.[2] That Final Judgment and Decree is Appendix B of this Petition. Petitioner Omaha Indian Tribe appealed the Memorandum Opinion (Appendix A) and the Final Judgment and Decree (Appendix B) to the United States Court of Appeals of the Eighth Circuit. That Court of Appeals rendered its opinion on August 12, 1988.[3] That Opinion is Appendix C of this Petition. On November 10, 1988, the Court of Appeals entered its Order denying the Petition for Rehearing *en banc*. That Order is Appendix D of this Petition.[4] On January 18, 1989, the Supreme Court entered an Order extending the time to file this Petition to and including February 28, 1989. That Order of the Supreme Court is Appendix E of this Petition.[5] In addition to the Opinions and Final Judgment referred to above

---

al.; Omaha v. Agriculture (hereafter referred to as Omaha v. Wilson) 578 F. Supp. 1191 (U.S.D.C.N.D. Iowa W.D. 1984), p. 51.

[2] Appendix B, Final Judgment and Decree, May 29, 1987, *United States v. Wilson; Omaha Indian Tribe v. Jackson; Omaha Indian Tribe v. Agricultural . . . Wilson;* Order June 30, 1987, Amending Final Judgment and Decree, p. 16a.

[3] Appendix C, *Omaha Indian Tribe v. Jackson; Omaha v. . . . Wilson*, 854 F.2d 1089 (CA 8, 1988), p. 37a.

[4] Appendix D, Order dated November 10, 1988, p. 49a.

[5] Appendix E, Order of Supreme Court dated January 18, 1989, p. 50a.

there are these Opinions, Findings of Fact, and Conclusions of Law to which reference is necessary in determining the grounds of the Final Judgment and the Opinions of the courts below.[6]

JURISDICTION

The opinion of the Court of Appeals for the Eighth Circuit, as stated above, was rendered on August 12, 1988, the Order denying Petitioner Tribe's motion for rehearing en banc was entered November 10, 1988, and the period for filing was extended by the Court

---

[6] Opinion of the District Court, dated September 4, 1981, declaring that Petitioner Omaha Indian Tribe had proved its valid claim to title to the 700 acres involved against Respondent Iowa and Respondents Lakin, et al. That Opinion is Appendix F of this Petition: Re: *United States v. Wilson; Omaha Indian Tribe v. Jackson; Omaha Indian Tribe v. Agriculture* . . . Wilson, 523 F.Supp. 874 U.S.D.C.N.D. Iowa W.D. 1981). On June 20, 1979, the Supreme Court upheld Petitioner Tribe's assertion that Respondents had the burden of proof pursuant to 25 U.S.C. 194. That Supreme Court Decision is Appendix H of this Petition: *Wilson v. Omaha*, 442 U.S. 653 (1979). The Supreme Court's Decision affirmed the Opinion of the Court of Appeals, applying 25 U.S.C. 194. That Court of Appeals Opinion is Appendix I of this Petition: *Omaha v. Wilson*, 575 F.2d 620 (CA 8, 1978). The Court of Appeals, Appendix I, reversed the District Court's Opinion declaring that the Respondents had sustained their burden of proof against Petitioner Tribe. That Opinion of the District Court was entered May 4, 1977 and is Appendix J of this Petition: *United States v. Wilson*, 433 F.Supp 57 (U.S.D.C.N.D. Iowa W.D. 1977). The Court of Appeals Opinion, Appendix I, likewise reversed the Findings of Fact and Conclusions of the District Court, which found as a fact and concluded as a matter of law that Petitioner Tribe had failed to sustain its burden of proof. That district Court's Findings of Fact and Conclusions of Law are Appendix K of this Petition: *United States v. Wilson*, 433 F.Supp. 67 (U.S.D.C.N.D. Iowa W.D. 1977).

to and including February 28, 1989.[7] The Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 8, Clause 3.

> The Congress shall have power to regulate Commerce . . . with the Indian Tribes; . . .

STATUTORY PROVISIONS INVOLVED

25 U.S.C. Sec. 194. Trial of right of property; burden of proof

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R.S. § 2126.

RULE 15(b), Federal Rules of Civil Procedure

(b) Amendments to Conform to the Evidence.

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgement; but failure so to amend does not affect the result of the trial of these issues. If evidence is ob-

---

[7] *See,* Appendices D and E.

jected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

STATEMENT OF THE CASE

Reference is initially made to the fact that Cross-Petitioner Iowa repeatedly refers to the Addendum to its Brief in Opposition to Cross-Respondent Omaha Indian Tribe's Petition for a Writ of Certiorari. That Addendum is not the published opinion in the case of *Omaha Indian Tribe v. Wilson*, sometimes referred to as OMAHA II.[8]

For example, in the Addendum it is stated:

> Evidence of river movement in the critical periods too often gives no more than a basis for an 'educated guess,' in the words of Defendants' expert witness, Raymond L. Huber.[9]

In the official published decision reference is made to Dr. George R. Hallberg, rather than to Raymond L. Huber. How many other departures there are from the official published decision in Cross-Petitioner Iowa's Addendum is not clear. What is clear is that

---

[8] 614 F.2D 1153 (CA 8, 1980); *cert. den.* 449 U.S. 825 (1980).

[9] Cross-Petitioner Iowa's Brief in Opposition, Add. p.A.17.

the Addendum is not an official publication upon which the Court may rely.

CROSS-PETITIONER IOWA IS SEEKING AN ADVISORY OPINION

The Court, in its *Wilson v. Omaha* opinion declared that 25 U.S.C. 194 had no application to Cross-Petitioner Iowa, using this explicit language:

> . . . in terms of the purpose of the provision [25 U.S.C. 194]—that of preventing and providing remedies against non-Indian squatters on Indian lands—it is doubtful that Congress anticipated such threats from the States themselves or intended to handicap the State so as to offset the likelihood of unfair advantage. . . .
>
> We hesitate, therefore, to hold that the State of Iowa must necessarily be disadvantaged by § 194 when litigating title to the property which it claims ownership. . . .[10]

That exemption from the application of 25 U.S.C. 194 for Cross Petitioner Iowa is not in any sense qualified—a fact admitted by Cross-Petitioner Iowa, which declares that:

> The State has not to date been adversely affected by operation of 25 U.S.C. § 194, as this Court held that section does not apply to the State of Iowa . . . and the State prevailed below.[11]

---

[10] Pet.App., Appendix H, p. 107a, 122a.

[11] Cross-Petition, p. 15.

Cross-Petitioner Iowa, admits that it has not as yet "been adversely affected by operation of 25 U.S.C. § 194" and engages in speculation as to what might happen under an unspecified, highly conjectural, and totally erroneous predicate. In simplest terms, Cross-Petitioner Iowa seeks from this Court an advisory opinion as to what might happen.

The refusal of the Court to render advisory opinions and the reasons for that Rule have been succinctly stated by the Court in these terms:

> This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties. . . .[12]

It is manifest beyond question that, in the present state of the record, Cross-Petitioner Iowa does not present either a case or a controversy under the Constitution respecting 25 U.S.C. 194 between itself and Cross-Respondent Tribe. Most assuredly there is no basis upon which the Court could grant a writ of certiorari. Both the Court and the Court of Appeals for the Eighth Circuit have carefully avoided applying 25 U.S.C. 194 to Cross-Petitioner Iowa.

It is to be noted, however, that Cross Petitioner Iowa refers to controversies between Cross-Respondent Tribe and the State of Iowa. Most assuredly those controversies do not involve 25 U.S.C.

---

[12] *Chicago & S. Airlines v. Waterman Steamship Co.*, 333 U.S. 103, 113-114 (1988). 1. C. Warren, *The Supreme Court in United States History* (Boston: Rev.Ed.1926), 108-111.

194. They stem from the gross misconduct of Evan L. Hultman, who forced his rejected representation upon the Tribe as United States attorney in *United States v. Wilson*[13] and fraudulently denied Cross-Respondent Tribe's title to the lands which he, Hultman, as former Attorney General of Cross-Petitioner Iowa, had obtained for Cross-Petitioner Iowa in a "previous settlement" among Cross-Petitioner Iowa and Respondents Lakin and R.G.P., Inc. (Raymond G. Peterson).[14]

Wholly apart from 25 U.S.C. 194, Cross-Respondent Tribe proved by a clear preponderance of evidence—found by the district court to be without the aid of 25 U.S.C. 194—that title resided in Cross-Respondent Tribe to the lands claimed by Cross-Petitioner Iowa.[15]

In the paragraphs which follow, consideration will be directed by Cross-Respondent Tribe to the ongoing controversies between Cross-Respondent Tribe and Cross-Petitioner Iowa.

It was not until the year 1965[16] that Cross-Petitioner Iowa had any claim to title within the Blackbird Bend Meander Lobe. In its injunctive order of June 5, 1975, the district court took cognizance of the fact that, although the Tribe had been forced out of possession for a great many years, the Tribe had never abandoned its claimed to the land. On the subject, the district court declared:

---

[13] Pet. p. 6-11.

[14] Opposition, p. 13.

[15] Pet. p. 9, *et seq.*; p. 14-15.

[16] Cross-Petition, p. 13.

> The record reflects that members of the Tribe have never totally acquiesced in defendants' use of the land and the Monona County Assessor apparently felt unsure enough of the status of title to omit these lands from the tax rolls for many years. Perhaps the true uncontested status was many years ago before the Missouri River changed its course.[17]

Moreover, when the district court denied the efforts of the Department of Justice to seize and take from the Tribe its "profits" from the farming operation, the district court rejected that effort, declaring:

> The Tribe will not be penalized for the government's failure for approximately 50 years to promptly seek quiet title to the trust lands.[18] [Reversed, Appen. C, p. 44a]

The record is replete with proof that Cross-Respondent Tribe at all times asserted its claim to title to the Blackbird Bend Meander Lobe. A reluctant or negligent trustee failed to protect the Tribe's property and, when the Tribe, acting through its own attorney, sought to recover the full 6390 acres of the Blackbird Bend Meander Lobe, Evan L. Hultman, United States Attorney, forced his representation upon the Tribe, fraudulently constricting the claim to 1900 acres.

Involved here is not only the source of Cross-Petitioner Iowa's title, but the fact that the title asserted by Cross-Petitioner Iowa is at the very best highly questionable and subject to divestiture if Cross-

---

[17] Pet.App., Appendix M, p. 256a, 260a.

[18] Pet.App., Appendix B, p. 16a, 35a.

Respondent Tribe is permitted to be heard respecting the forced, fraudulent representation by Evan L. Hultman, United States Attorney, as is requested in its Petition for a Writ of Certiorari.[19]

In view of the fact that Cross-Petitioner Iowa's title is predicated upon the fraud of its former Attorney General, Evan L. Hultman, it is wholly improper for Cross-Petitioner Iowa to lament the problems that it had encountered in offering proof respecting the ". . . possession of the land prior to river movements occurring 100 years and 60 years ago."[20] A cursory review of the record establishes that Cross-Petitioner Iowa did not undertake to prove the source of its title other than to refer to the Hultman quiet title actions in 1965 and the conformitory quitclaim deeds. More importantly, and subsequently discussed, the title of Cross-Petitioner Iowa stems directly from Mr. Hultman's "sell-out"[21] of Cross-Respondent Tribe in the case of *United States v. Wilson*, in which Mr. Hultman denied Cross-Respondent Tribe's title to the lands claimed by Mr. Hultman for Cross-Petitioner Iowa.[22]

In the trial on the merit, Cross-Petitioner Iowa offered no evidence respecting river movements, much less "movements occurring 100 years and 60 years ago." There is no basis for Cross-Petitioner Iowa's attack upon 25 U.S.C. 194 by declaring:

---

[19] Pet. p. i, initial question; p. 6-9.

[20] Cross Petition, p. 13.

[21] Pet. p. 18; *Fiske v. Buder*, 125 F.2d 841, 849 (CA 8, 1942; *cert. den.* 273 U.S. 756 (1942).

[22] Pet., p. 7, *et seq.*

> There is no rational connection between possession prior to the river's movements and a party's status as an Indian and the conclusion that the river moved by avulsion, the fact to be presumed.[23]

Continuing without reason its attack against 25 U.S.C. 194, from which Cross-Petition Iowa has been expressly exempt, Iowa declares that "[t]he Missouri River does not discriminate against Indians"[24]—whatever that means. Most assuredly the record is devoid of any reason which would give rise to that unusual statement.

Cross-Petitioner Iowa has departed totally from the express language of 25 U.S.C. 194, the OMAHA I decision,[25] and the Court's *Wilson v. Omaha* decision.[26] Rather, Cross-Petitioner Iowa declares that:

> The application of Section 194 to create a presumption of avulsion is not rationally related to its ostensible purpose—to protect Indians from unfair advantage.[27]

Source of that total misconception that in some fashion 25 U.S.C. 194 created "a presumption of avulsion" is repeated in these terms:

> Section 194 exacerbates this inequity by creating a presumption of avulsion (or accretion) whenever a tribe so desires.[28]

---

[23] Cross-Petition, p. 13.

[24] Cross-Petition, p. 13.

[25] Pet.App., Appendix I, p. 135a, 147a-155a.

[26] Pet.App., Appendix H, p. 107a, 117a-123a.

[27] Cross Petition, p. 13.

[28] *Ibid.*, p. 14.

An examination of the legislative history, the judicial analyses in OMAHA I and the Court's *Wilson v. Omaha* decision, and the plain reading of 25 U.S.C 194 belies any basis for those two irrational conclusions. Those irresponsible statements as to the affect of 25 U.S.C. 194 presage these equally impermissible conclusions:

> Permitting the United States to obtain title to real property by virtue of an unreasonable presumption constitutes an unconscionable taking of property. . . . This statute where applied in this case operates as a permanent taking of title to the land by the United States.

Having declared that the national government was exceeding its powers, Cross-Petitioner Iowa then states that:

> Congress cannot deprive a state of its property without payment of compensation. A court cannot therefore constitutionally apply 25 U.S.C. § 194 where to do so would constitute a taking of the State's property.[29]

The Court's decision in *Wilson v. Omaha* shows the total misconception as expressed by Cross-Petitioner Iowa of the responsibilities of the National Government as Trustee for Cross-Respondent Tribe. There was reviewed in *Wilson v. Omaha* the objectives of 25 U.S.C. 194. It was for the express purpose of protecting ". . . Indians from claims made by non-Indian squatters on their lands.[30] Those who formu-

---

[29] *Ibid.*, p. 14.

[30] Pet.App., Appendix H, p. 107a, 119a-122a.

lated 25 U.S.C. 194 could not be expected to anticipate that an United States Attorney—here Even L. Hultman—would "sell out" an Indian Tribe for the benefit of his former client, "squatter" Cross-Petitioner Iowa.

CROSS-PETITIONER IOWA ADMITS BASIC CHARGES BY CROSS-RESPONDENT TRIBE AGAINST UNITED STATES ATTORNEY HULTMAN[31]

Cross-Respondent Tribe Proved Its Title Without the Aid of 25 U.S.C. 194

Cross-Respondent Omaha Indian Tribe, in its Petition for a Writ of Certiorari to the Court, stressed that the lands claimed by Cross-Petitioner Iowa within the Barrett Survey Line were the same lands which Evan L. Hultman, as Attorney General for Cross-Respondent Iowa, had obtained for the State of Iowa from from Cross-Petitioners Lakin and R.G.P., Inc. (Peterson). Cross-Petitioner Iowa has admitted that Evan L. Hultman, United States Attorney in *United States v. Wilson*, had as Attorney General represented Cross-Petitioner Iowa ". . . when the State settled a quiet-title suit between itself and private defendants [Cross-Petitioners Lakin and R.G.P., Inc., Peterson] *in this same area*"[32]—a most shocking violation of the Code of Professional Responsibility,[33] and not mentioned or in any sense explained by Cross-Petitioner Iowa.

---

[31] Cross-Petition, p. 5-9; *see*, Pet. p. 7, *et seq.*; p. 9, *et sea.*; p. 18, *et seq.*

[32] Cross-Petitioner Iowa's Brief in Opposition to Cross-Respondent Tribe's Petition for a Writ of Certiorari, p. 13; *see* Pet., p. 20. (Emphasis supplied)

[33] Pet., p. 20-21.

Cross-Petitioner Iowa then declares that the Tribe "... has not shown how the previous settlement" by Evan L. Hultman of the claims among Cross-Petitioners Iowa, Lakin and R.G.P., Inc. "affected the Tribe's claim in this case."[34] That statement is irresponsible in view of the unchallenged and fully documented statements "that Evan L. Hultman's sellout" of Cross-Respondent Tribe had resulted in (a) Cross-Respondent Tribe being deprived of title to 980 acres (originally 700 acres) of land *within* the Barrett Survey Line; and (b) Tribe's claim to 6390 acres of land was diminished by Evan L. Hultman to 1900 acres with the attendant abandonment by Evan L. Hultman of Tribe's valid claim to 3400 acres of land *outside* the Barrett Meander Line.[35]

In the trial on the merits, Cross-Respondent Tribe, without the aid of 25 U.S.C. 194, proved by a clear preponderance of the evidence that—in the words of the district court—"... the defendants [including Cross-Petitioner Iowa] have no right or claim to any land in the western Barrett Survey, including the lands occupying the area described by fee patents."[36] Specifically in regard to Cross-Petitioner Iowa, the district court found that the lands claimed by Cross-Petitioner Iowa "were washed away" and replaced by accretions to Cross-Respondent Tribe's trust lands.[37]

Quitclaim deeds from Cross-Petitioners Lakin and R.G.P., Inc. (Peterson) were offered in evidence in

---

[34] *Ibid.*

[35] Pet., p. 6-11; *see*, Plates I and II, p. 8, 10.

[36] Pet.App., Appendix F, p. 52a, 83a.

[37] *Ibid.*, p. 78, para. 3.

the trial on the merits in support of Cross-Petitioner Iowa's claim to title. Cross-Respondent Tribe established in the trial on the merits that Cross-Petitioner Iowa's grantors, Cross-Petitioners Lakin and R.G.P., Inc., had failed to prove their title. The district court declared that the quitclaim deeds from Cross-Petitioners Lakin and R.G.P., Inc. did not and could not transfer title to Cross-Petitioner Iowa, based upon these facts and law:

> The State's claim to western Barrett Survey lands based upon quitclaim deeds from other defendants also falls. A quitclaim is used by a grantor to convey only such interest as he has . . . .[U]nder a conveyance by a quitclaim deed the grantor had. If the grantor himself has no title or interest [as here] to the property conveyed, most courts hold that the grantee takes nothing under a quitclaim deed.[38]

It is of extreme importance here that the district court found with specificity that Cross-Respondent Tribe had proved its title against Cross-Petitioner Iowa without the aid of 25 U.S.C. 194. This is the language of the district court, which likewise exposes the grave misrepresentations contained in the Cross-Petition filed by the State of Iowa:

> Even if 25 U.S.C. § 194 did not apply and the Tribe had the burden of proof, this Court holds that Tribe established by a clear preponderance of the evidence its right and claim

---

[38] *Ibid.*, p. 78a, n. 6.

> to the land occupying the area described in the fee patents.[39]

In the record before the Court in *Wilson v. Omaha* there is set forth the evidence relied upon by the district court giving rise to its declaration that title to the accretions west of the trust land—the land claimed by Cross-Petitioner Iowa—resided in Cross-Respondent Tribe rather than Cross-Petitioner Iowa.[40] As found by the district court in *Blackbird Bend II* the "several hundred acres of land" referred to by the Court in *Wilson v. Omaha*[41] had been obliterated and replaced by accretions to Cross-Respondent Tribe's trust lands. The Court did not deny—indeed did not consider—whether Cross-Respondent Tribe could be deprived of its title to accretions to the trust lands which had totally replaced the obliterated fee-patented lands a half century prior to the denial of Cross-Respondent Tribe's title to those lands by Evan L. Hultman in *United States v. Wilson.*

Reference was specifically made by the district court to *Wilson v. Omaha* in which the Court commented upon the "avulsive-accretion riddle" involving disputes between ". . . Indians on one side" and non-Indians on the other. The Court then added:

> . . . in this case several hundred acres of land within the Barrett survey are held in fee, and conceivably are not Indian property.[42]

---

[39] *Ibid.*, p. 80, n. 19.

[40] Pet.App. Appendix F, p. 52a, 80a, para. 5.

[41] Pet.App., Appendix H, p. 107a, 128a.

[42] *Ibid.*

There was not presented in the phase of the litigation before the Court in *Wilson v. Omaha* the issue of title to the "... several hundred acres of land" to which the Court referred. By way of explanation as to why this issue of the "... several hundred acres of land within the Barrett survey are held in fee" was not before the Court stems from the fact that in *OMAHA I* the Court of Appeals had applied 25 U.S.C. 194 to Cross Petitioner Iowa and title to the several hundred acres of land occupied principally by Cross-Petitioner Iowa was awarded to Cross-Respondent Tribe by the Court of Appeals. It was not until the remand to the district court, exempting Cross Petitioner Iowa from the application of 25 U.S.C. 194, that the fatally defective title claimed by Cross-Petitioner Iowa was fully considered by the district court.

As reviewed above, the district court found that, without the aid of 25 U.S.C. 194, the Tribe had proved its title against Cross-Petitioner Iowa and quieted title against Cross-Petitioner Iowa.

From the district court's award to Cross-Respondent Tribe of the accretions to its trust lands which had replaced the "fee patented lands" excepted by Evan L. Hultman and denied title to Cross Petitioners Iowa, Iowa appealed the issue. It is most unfortunate that Cross-Petitioner Iowa departs so radically from the facts contained in the record when it makes this erroneous statement in its Cross-Petitioner:

> The Tribe's argument that *Omaha II* conclusively established its right to the State lands as accretions to the 'trust lands' had been

> adopted by the District Court on remand from *Omaha II. Blackbird Bend II* (Pet.Ap. pp. 56a-57a, 83a-84a).[43]

Cross-Petitioner Iowa simply departs from the fact when it asserts that Cross-Respondent Tribe relied upon "Omaha II" to establish its valid claim to title against Cross-Petitioner Iowa. As previously stated, it was OMAHA I that conclusively established that the "squatters" had failed to sustain their burden of proof.[44]

Moreover, Cross-Petitioner Iowa does not attempt to support the drastic departure in OMAHA III from the basic language and rationale of the Court in *Wilson v. Omaha.*[45]

COURT OF APPEALS EFFECTIVELY ABROGATED THE COURT'S *WILSON V. OMAHA* DECISION

The Court of Appeals in OMAHA III acknowledges the district court's findings and conclusions that the land claimed by Cross-Petitioner Iowa ". . . was completely washed away by the post-1923 western movement of the river" and reemphasized that fact by stating "it is undisputed that" the lands claimed by Cross-Petitioner Iowa are accretions to Cross-Respondent Tribe's trust lands but declared, nevertheless—relying on *Wilson v. Omaha*, it is believed in total error—that:

> We deem this fact not significant. It is the *area* of land now occupied by the landowners

---

[43] Cross-Petition, p. 7.

[44] Pet.App., Appendix I, p. 135a, 167a.

[45] Pet.App., Appendix H, p. 107a, 119a-123a.

> that is important. *See, Wilson v. Omaha Indian Tribe,* 442 U.S. at 668. . . .[46]

The magnitude of the conflict between the Court of Appeals' OMAHA III decision and *Wilson v. Omaha* is clearly defined. The Court in *Wilson v. Omaha* most assuredly did not declare that Cross-Petitioner Tribe could not succeed against Cross-Petitioner Iowa—as it did in fact—when it proved accretions to its "trust lands." For the Court of Appeals to declare that *Wilson v. Omaha* so held is in clear violation of the express language of the Court. By its opinion, the Court of Appeals has effectively abrogated the Court's opinion in *Wilson v. Omaha.* To interpret *Wilson v. Omaha* as awarding title to "the landowners" who were occupying the land at the time of the trial is clear violation of the Court's opinion. It is manifest that the Court of Appeals had great difficulty in rationalizing away Tribe's title to the accretions to Tribe's trust lands. To justify its denial of Tribe's proven title to the accretions to the trust lands, the Court of Appeals declared—in total error—that the only means pursuant to which title to those lands could be acquired by the Tribe under *Wilson v. Omaha* was by an avulsion over and across the Barrett Survey land.[47] As reviewed above, Cross Respondent Tribe proved its title to those lands as accretions to Tribe's trust lands which in no way involved an avulsion.[48]

---

[46] Pet.App., Appendix G, p. 92a, 99a-101a-103a. (Court's emphasis).

[47] Pet.App., Appendix G, p. 92a, 101a.

[48] *Supra,* p. 15.

Fully cognizant that the Tribe had been awarded title by the district court without reliance upon 25 U.S.C. 194, the Court of Appeals in OMAHA III, utilizing cryptic language, declared that Cross-Respondent Tribe would be denied title because it could not "bootstrap" 25 U.S.C. 194. Understandably Cross-Petitioner Iowa embraces the "bootstrap language"[49] without explaining the meaning of it and seeks to have the Court affirm the drastic departure of the Court of Appeals in OMAHA III, which rejects the undenied and undeniable proof that Cross-Petitioner Tribe has title vested in it—totally independent from 25 U.S.C. 194—all as explicitly reviewed above.

It is incredible that the Court of Appeals should thus construe 25 U.S.C. 194 as denigrating the quality of Cross-Respondent Tribe's title to the trust lands by denying Tribe the right to accretions to those trust lands. Accretions are an invaluable property right, one of the natural attributes of title. In Horn-Book Theory, the Court of Appeals, in grave error, has denied that the Tribe has title to one of the sticks in the bundle of rights constituting fee simple title.

In denying Tribe the accretions which are part and parcel of the trust lands and recognizing title in Cross-Petitioner Iowa to the nonexistent fee patent lands, the Court of Appeals violated the most elemental principles of real property law recognized, enunciated, and applied by the district court in these terms:

> In both Nebraska and Iowa, the effect of such a movement of the river is to destroy

---

[49] Cross Petition, p. 7, 11.

> the title to the land obliterated by the movement of the river. *State v. Matzen*, 197 Neb. 592, 250 N.W.2d 232 (1977); *Winkle v. Miters*, 195 Neb. 821, 241 N.W.2d 329 (1976); *Rupp v. Kirk*, 231 Iowa 1387, 4 N.W.2d 264 (1942); *Wilcox v. Pinney*, 250 Iowa 1378, 98 N.W.2d 720 (1959). This court cannot, therefore, apply state laws of adverse possession or laches based upon the former title to the lands in fee patent. Application of those laws if at all, must be based upon the present character of the title to the accretions.[50]

In petitioning the Court to reverse the "bootstrapping" concepts of the Court of Appeals, Cross-Respondent Tribe emphasizes to the court that Cross-Petitioner Tribe was intentionally victimized by Cross-Petitioner Iowa's former Attorney General who violated the most basic precepts of the Code of Professional Responsibilities in forcing his representation upon Cross-Respondent Tribe for the benefit of Cross-Petitioner Iowa.[51]

TRIAL ON THE MERITS PERTAINED TO 6390 ACRES—NOT CONSTRICTED BARRETT SURVEY LINE

Cross-Petitioner Iowa is totally in error in declaring that the "Barrett Survey area" has been tried and that ". . . the second portion of the suit has not yet been tried."[52] Cross-Petitioner Iowa seeks to avoid the fact that it answered and counterclaimed against Cross-Respondent Tribe's complaint in *Omaha v. Wil-*

---

[50] Pet.App., Appendix F, p. 52a., 81a.

[51] Pet., p. 7, *et seq.*, p. 20 and cited authorities.

[52] Cross-Petition, p. 5.

son in which Cross-Respondent Tribe claimed title to 6390 acres in the Blackbird Bend Meander Lobe.[53]

In that counterclaim, Cross-Petitioner Iowa did not limit its answer and counterclaim to the "Barrett Survey area"; rather Cross-Petitioner Iowa asserted in its answer and counterclaim that the land which may have been at one time within the ". . . geographical area of the Omaha Indian Reservation . . . which is now owned by the State of Iowa, was eroded, washed away and ceased to exist by action of the Missouri River, and the rights of the Plaintiff [Cross-Respondent Tribe] to said land was extinguished thereby."[54]

Though Cross-Petitioner Iowa, in the trial on the merits, could best be described as a by-stander—offering virtually no evidence on its own behalf other than seeking to establish Cross-Petitioner Iowa's claim to title based upon its "previous settlement" by Evan L. Hultman with Respondents Lakin and R.G.P., Inc.—it nevertheless, in error, vigorously attacks what it perceived to be Cross-Respondent Tribe's evidence offered in the trial on the merits.[55]

Cross-Petitioner Iowa would have the Court ignore the fact that the entire trial on the merits pertained to the full 6390 acres of land comprising the Blackbird Bend Meander Lobe rather than in conformity with the 1976 pretrial *sua sponte* Order[56] that purported

---

[53] Pet., p. 9, "Petitioner Tribe's Quiet Title Action, *Omaha v. Wilson.*"

[54] Pet.App., Appendix DD, p. 384a, 387a, para. 42.

[55] Cross-Petition, p. 6.

[56] Pet. App., Appendix GG, p. 403a, 405a, first para.

to limit the trial to the "Barrett Survey." Cross-Petitioner Iowa in seeking to limit the case to the lands within the "Barrett Survey," avoided reference to that fact, as reviewed above, that they pleaded and undertook to prove that the entire Blackbird Bend Meander Lobe comprising 6390 acres was washed away and replaced by accretions to the Iowa riparian land. It is the *record* in the case—the oral, documentary, and demonstrative evidence—to which the April 5, 1976 *sua sponte* pretrial order must conform—not the converse, as urged by Cross-Petitioner Iowa.

Repeatedly the courts have declared, pursuant to Rule 15(b) of the Federal Rules of Civil Procedure, that where, as here, the evidence offered by all parties is received into the record without objection, the parties are bound by the issues actually tried irrespective of the pretrial order.[57] The precedents uniformly hold that where, as here, issues which were not stated in a pretrial order, but evidence was nevertheless offered without objection, the pretrial order is considered to have been amended to be in conformity with the proof offered in the trial on the merits.[58]

Moore has stressed that pretrial orders entered pursuant to Rule 16 of the Federal Rules of Civil Procedure should be read in light of Rule 15(b).[59] In

---

[57] *Dean Foods Co. v. Albrecht Dairy Co.*, 396 F.2d 652 (CA 8, 1968).

[58] *Shelley v. Union Oil Co.*, 203 F.2d 808 (CA 9, 1956); *see* also *Vogrin v. Hedstrom*, 220 F.2d, 863 (CA 8, 1955) *cert. den.* 350 U.S. 845 (1955).

[59] Vol. 3, *Moore's Federal Practice* (Cumulative Supplement, 1988-89) "To Conform To Evidence R.15(b)," Sec. 15-13[1]. p. 15-119, *et seq.*

addition, *Moore* reviews in detail an abundance of authority which holds that pretrial orders are to be amended to conform with the evidence received into the record either by express agreement or implied approval based upon failure to object. In the Court's decision of *Brandon et al., v. Holt*[60] there is reviewed in comprehensive detail the principle that the proof in the record is controlling over pleadings and pretrial orders.

The concepts enunciated above most surely have application to the *sua sponte* pretrial order which was totally ignored at the trial on the merits and which must be set aside to comport with the pleadings and proof in the record offered by all parties, Cross-Respondent Tribe and Petitioners alike, which proof related to the entire Blackbird Meander Lobe, and not to the constricted "Barrett Survey," as argued by Cross-Petitioner Iowa. The Court, in the *Brandon* decision, cites Rules 15(b) and the authorities which have applied that Rule which was designed " 'to avoid the tyranny of formalism.' " It has been authoritatively stated that the procedures provided for Rule 15(b):

> . . . are intended to promote the objective of deciding cases on their merits rather than in terms of the relative pleading skills of counsel or on the basis of a statement of the claim or defense that was made at a preliminary point in the action [the *sua sponte* order] and later proved to be erroneous.[61]

---

[60] 469 U.S. 464, 471 (1985).

[61] Vol. 6, *Federal Practice and Procedure*, Sec. 1491, p. 45.

It is correct to say that Cross-Petitioner Iowa totally misconceived the main thrust of the decision upon which it is relying.[62] In that opinion, the Court of Appeals for the Eighth Circuit was *not* analyzing the evidence offered by Cross-Respondent Tribe. It was assessing the evidence offered by Cross-Petitioners predicated upon *Wilson v. Omaha*, declaring that the Tribe under 25 U.S.C. 194 did not have the burden of proof. Specific reference was made by the Court of Appeals to the unsuccessful efforts of Cross-Petitioner Iowa and the other Cross Petitioners to prove the impossible—that the Blackbird Bend Meander Lobe including the Barrett Survey land was accretions to the Iowa riparian bank.

Following the same erroneous course as the other Cross-Petitioners, it is asserted by Cross-Petitioner Iowa that "educated guesses" were part of Cross-Respondent Tribe's evidence. That implication is totally in error. It is unquestionably true that Cross-Petitioners' expert, Dr. Hallberg, admitted on cross-examination, that his expert opinions were "educated guesses."[63] In that regard reference is made to the fact that all of the Plates extensively utilized by both the district court and the Appellate Court were copies of Tribe's exhibits, admitted into evidence at the trial on the merits based upon the testimony of Tribe's well-qualified experts.[64]

---

[62] *Omaha v. Wilson*, 614 F.2d 1153 (CA 8, 1980); *cert. den.* 449 U.S. 825 (1980).

[63] Cross-Petition, p. 11, n. 14.

[64] Pet.App., Appendix 1, OMAHA I, p. 135a, 142a-144a; Appendix F, *Blackbird Bend II*, p. 52a, 58a-65a.

Principles of *Res Judicata* Forclose Cross-Petitioner Iowa's Efforts To Force a New Trial of Issues Already Concluded

Cross-Petitioner Iowa participated in all aspects of the trial on the merits, and is most assuredly bound by that participation, albeit as more of a spectator, in which Cross-Petitioners Lakin, Wilson, R.G.P. Inc., et al., vigorously attempted to prove that the Blackbird Bend Meander Lobe was accretions to the Iowa riparian land. Cross-Petitioner Iowa, moreover, counterclaimed against Cross-Respondent Tribe's claim to the full 6390 acres in the Blackbird Bend Meander Lobe, declaring among other things, that Cross-Respondent Tribe's title had been extinguished due to the fact that the Blackbird Bend Meander Lobe had been totally destroyed by Missouri River action.[65]

The issues were fully tried by all parties in the trial on the merits involving the lands outside the Barrett Meander Line extending throughout the entire Blackbird Bend Meander Lobe. All parties participated in that trial including Cross-Petitioner Iowa. The precepts respecting the applicability of *res judicata* have been fully reviewed[66] and are most surely applicable to Cross-Petitioner Iowa. It was stressed to the Court of Appeals that:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the

---

[65] Pet.App., Appendix DD, p. 384a, 387a, para. 42

[66] See, Pet. p. 23 and authorities cited there.

parties, whether on the same or in a different claim.[67]

CONCLUSION

Cross-Respondent Omaha Indian Tribe urges the Court to deny Iowa's Cross-Petition for the reasons reviewed above.

Respectfully submitted,

William H. Veeder
818 18th Street, N.W. #920
Washington, D.C. 20006
(202) 466-3890

Attorney for
Omaha Indian Tribe

---

[67] Restatement (Second) Judgment, para. 27, p. 250.